

<b>In the Matter of</b>	)	
	)	
<b>The Southern New England Telephone</b>	)	
<b>Company</b>	)	
	)	
<b>Petition for Declaratory Ruling and Order</b>	)	<b>WC Docket No. 04-30</b>
<b>Preempting the Connecticut Department</b>	)	
<b>of Public Utility Control’s Decision</b>	)	
<b>Directing The Southern New England</b>	)	
<b>Telephone Company To Unbundle Its</b>	)	
<b>Hybrid Fiber Coaxial Facilities</b>	)	

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

<b>In the Matter of</b>	)	
	)	
<b>The Southern New England Telephone Company</b>	)	
	)	
<b>Petition for Declaratory Ruling and Order Preempting the Connecticut Department of Public Utility Control's Decision Directing The Southern New England Telephone Company To Unbundle Its Hybrid Fiber Coaxial Facilities</b>	)	<b>WC Docket No. 04-30</b>
	)	
	)	

**COMMENTS OF MCI**

Pursuant to the Federal Communications Commission's ("FCC" or "Commission")  
*Public Notice* dated February 12, 2004, MCI opposes The Southern New England Telephone  
Company's ("SBC's") "Emergency Request for Declaratory Ruling and Preemption."<sup>1</sup>

**INTRODUCTION AND SUMMARY**

SBC's claim that the decision of the Connecticut Department of Public Utility Control  
("DPUC") is preempted by federal law rests upon a series of mischaracterizations of both the  
DPUC's decision and applicable preemption doctrine. Far from thwarting or frustrating either  
the Telecommunications Act of 1996 ("1996 Act" or "Act") or its implementing regulations, the  
DPUC's decision reflects a careful accommodation between state commission authority to

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<sup>1</sup> Public Notice, *Pleading Cycle Established for Comments on SBC's Emergency Request for  
Declaratory Ruling and Preemption*, WC Docket No. 04-30, DA No. 04-377 (FCC Feb. 12,  
2004).

regulate telecommunications and the limits imposed on that authority by the federal regulatory regime. Indisputably, there is no direct conflict with federal rules: At issue in this proceeding are hybrid-fiber coaxial network facilities that the Commission has not considered in any of its inquiries into the unbundling obligations of incumbent local exchange carriers. Lacking a direct conflict, SBC misrepresents the state proceedings to create one, and postulates a field preemption rule that is far removed from the preemption provisions in the 1996 Act. Taken to its logical conclusion, SBC's position is simply a renewed effort to eliminate entirely the role of state commissions in the regulation of telecommunications, an agenda previously rejected by this Commission in the *Triennial Review Order* ("TRO")<sup>2</sup>. SBC's factual and legal claims should be rejected, and its petition should be denied.

The 1996 Act implements a hybrid state-federal regulatory scheme: Section 251(d)(3) expressly provides that states remain free to regulate telecommunications consistently with the terms and purposes of the federal scheme. Confronted with a petition regarding network infrastructure for which the federal regulations have provided no national standards, the DPUC operated precisely within the scope of that retained jurisdiction. Taking into account the unique circumstances that obtain in its state, the DPUC found that the facilities at issue – a network of hybrid fiber-coaxial cable ("HFC") – fell within the definition of unbundled network elements. Therefore, the DPUC exercised its state law authority to order their unbundling and to initiate cost proceedings to determine the level of compensation to which the ILEC is entitled. In reaching this conclusion, the DPUC acted consistently with the imperatives reflected in the federal regulatory scheme, and particularly in the *TRO*, of promoting competition while still encouraging innovation and investment in new-generation technology.

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<sup>2</sup> *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16978, ¶ 192 (2003).

Granting SBC's Emergency Request would represent a wholesale abandonment of the FCC's stated views on preemption and would be flatly inconsistent with the 1996 Act. The network elements at issue here in no way fall into the categories outlined in the *TRO* as being appropriately subject to preemption. HFC facilities are neither an "element for which the Commission has . . . found no impairment," nor one for which the Commission has expressly "declined to require unbundling on a national basis."<sup>3</sup> Rather, this case presents a special case in which state-specific analysis is highly appropriate and in which the "direct inconsistency" claimed by SBC simply does not exist. SBC assumes that the FCC has occupied the field so that any facilities not identified for unbundling in the FCC's national list remain closed to any consideration by state commissions. However, the *TRO* specifically acknowledges that Section 251(d)(3) "preserves the states' authority to establish unbundling requirements pursuant to state law," and that "[m]any states have exercised [that] authority under state law to *add network elements to the national list*."<sup>4</sup>

## **BACKGROUND**

### **I. Proceedings Before The DPUC**

On January 2, 2003, Gemini Networks CT ("Gemini") filed a Petition For Declaratory Ruling with the DPUC,<sup>5</sup> requesting the unbundling of a network of HFC facilities owned by SBC. The HFC facilities, which comprise a network of optical fiber, coaxial cable, and attendant facilities, were constructed by SBC in the 1990s as part of SBC's efforts to consolidate and extend its telecommunications services. As planned, the HFC network was designed to replace

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<sup>3</sup> *TRO* ¶ 195.

<sup>4</sup> *TRO* ¶ 191 (emphasis added).

<sup>5</sup> Petition for Declaratory Ruling, *Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding the Southern New England Telephone Company's Unbundled Network Elements*, Docket No. 03-01-02 (DPUC filed Jan. 2, 2003) ("Gemini Petition").

SBC's legacy telephony network and to provide additional services such as broadband data transmission and cable video services.<sup>6</sup> From its inception, then, the HFC network was designed to provide local telephony as part of an overall suite of communications services.

Ultimately, SBC made different use of the HFC network facilities, leasing part of them to its subsidiary cable television provider, SNET Personal Vision,<sup>7</sup> and "repurposing" some of the fiber portions of the HFC plant to provide telephony services.<sup>8</sup> Some decommissioning of facilities has occurred, but it is estimated that approximately 94% of the basic cable plant remains in place and subject to redeployment with some reconditioning.<sup>9</sup>

Gemini, the competitive carrier seeking access to the HFC facilities, is certified by the DPUC to provide retail local exchange services, wholesale telecommunications services, and wholesale Internet access services in Connecticut.<sup>10</sup> Initially, Gemini attempted to negotiate a voluntary agreement with SBC to lease the HFC facilities, but SBC declined, asserting that it was under no obligation to unbundle its HFC network.<sup>11</sup> Subsequently, on January 2, 2003, Gemini filed the Petition For Declaratory Ruling with the DPUC, seeking a declaration pursuant to state law that SBC's HFC facilities constitute UNEs and, thus, must be tariffed and offered for lease on an unbundled basis.<sup>12</sup> Gemini also requested that the DPUC conduct a cost of service

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<sup>6</sup> *Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding the Southern New England Telephone Company's Unbundled Network Elements*, Decision, Docket No. 03-01-02, pp. 24-25 (DPUC Dec. 17, 2003) ("*DPUC Decision*").

<sup>7</sup> *Id.* at 1.

<sup>8</sup> Transcript of Oral Argument before the Department of Public Utility Control, Dec. 10, 2003, at 74-75. Note also that the requesting carrier has committed to performing any necessary reconditioning.

<sup>9</sup> *Id.* at 55-60.

<sup>10</sup> *DPUC Decision* at 1.

<sup>11</sup> *Id.* at 3.

<sup>12</sup> *Id.* at 3.

proceeding to determine an appropriate pricing structure for the elements and direct SBC to file an inventory of all plant formerly leased to SNET Personal Vision.<sup>13</sup> The Connecticut Attorney General and the Connecticut Consumer Counsel entered the proceeding as intervenors in support of Gemini.<sup>14</sup>

In considering Gemini's petition, the DPUC called for an initial round of comments prior to the August 21, 2003 release of the FCC's *Report and Order* in the Triennial Review Proceeding.<sup>15</sup> After the release of the *TRO*, the DPUC solicited an additional round of comments seeking discussion on the *TRO*'s potential impact on the unbundling issues raised by Gemini's Petition.<sup>16</sup> The DPUC issued a *Draft Decision* on November 3, 2003, and the parties were given an opportunity to file written exceptions and present oral argument in response.<sup>17</sup>

The DPUC issued its final *Decision* on December 17, 2003, in which it held that SBC's HFC facilities must be unbundled under state law and directed Gemini and SBC to negotiate an interconnection agreement.<sup>18</sup> SBC subsequently filed its Emergency Request for Declaratory Ruling and Preemption with the FCC.

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<sup>13</sup> *Id.* at 1.

<sup>14</sup> *Id.* at 19-24.

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 3.

<sup>18</sup> *Id.* at 1, 45, 49.

## II. The Connecticut DPUC Acted In Accordance With State Law

In ordering the unbundling of the HFC network elements, the DPUC based its *Decision* on Connecticut General Statute Section 16-247b(a), the state unbundling statute.<sup>19</sup> Section 16-247b(a) provides in pertinent part as follows:

On petition or its own motion, the department shall initiate a proceeding to unbundle a telephone company's network, services and functions that are used to provide telecommunications services and which the department determines, after notice and hearing, are in the public interest, are consistent with federal law and are technically feasible of being tariffed and offered separately or in combination.

Accordingly, network elements are subject to unbundling if: (1) they are “used to provide telecommunications services”; (2) unbundling is in the public interest; (3) unbundling is consistent with federal law; and (4) the network elements are capable of being tariffed and offered separately or in combination.<sup>20</sup>

The DPUC properly analyzed and applied Section 16-247b(a) and its decision was rendered in full accordance with state law. Moreover, the DPUC was particularly careful to ensure that its interpretation and application of Section 16-247b(a) was consistent with the 1996 Act and the range of implementing regulations issued by the Commission. Basing its authority to order unbundling of network elements on Section 16-247b(a), the DPUC laid out in considerable detail the federal regulatory scheme within which it is able to exercise authority.<sup>21</sup> Each of its determinations under Section 16-247b(a) was entirely within the context of the federal statutory and regulatory limits within which the DPUC recognized it must operate. The DPUC's negotiation of this complicated regulatory terrain cannot be faulted.

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<sup>19</sup> *Id.* at 2.

<sup>20</sup> *Id.* at 33-34; Conn. Gen. Stat. § 16-247b(a).

<sup>21</sup> *DPUC Decision* at 28-33.

## ARGUMENT

### I. Federal Preemption Doctrine And The Preemption Provisions Of The *TRO*

In the *TRO*, the Commission properly held that “[i]f Congress intended to preempt the field, Congress would not have included Section 251(d)(3) in the 1996 Act.”<sup>22</sup> The Commission recognized that there is preemption only when there is open and explicit conflict between a state action and the federal regulatory scheme. In the *UNE Remand Order*, for example, the Commission preempted state commissions from refusing to unbundle UNEs whenever the FCC found that CLECs were in all situations impaired without access to the UNE.<sup>23</sup> By contrast, as the *TRO* recognizes, the regulatory power reserved to the states has been exercised to *add* UNEs to the federally mandated list.<sup>24</sup>

Consistent with long-standing preemption doctrine, such state action is only preempted where the conflict between the state and federal provisions is so pronounced that allowing the state action or provision to stand effectively “thwarts or frustrates the federal regime.”<sup>25</sup> That is, the state unbundling actions cannot “*substantially prevent*,” the implementation of the federal regulatory regime.<sup>26</sup>

The supporting authorities cited by SBC in its petition illustrate that the kind of conflict that triggers preemption must be so pronounced that there is simply no capacity for the state and federal provisions to coexist. In *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), for example, the Department of Transportation (“DOT”) had explicitly determined that federal automobile safety objectives were best served by mandating a range of safety options among

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<sup>22</sup> *TRO* ¶ 192.

<sup>23</sup> *See id.* ¶ 193.

<sup>24</sup> *Id.* ¶ 191.

<sup>25</sup> *Id.* ¶ 192.

<sup>26</sup> *Id.* ¶ 193 (emphasis added).

which manufacturers had to choose to install in new cars.<sup>27</sup> The fact that automobile manufacturers could *choose* among safety options was integral to the DOT's regulations. Accordingly, a common law tort doctrine that effectively restricted such choice constituted a direct impediment to the advancement of the federal policy and, therefore, had to give way. Similarly, in *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767 (1947), federal and state regulations inconsistently treated *precisely* the same class of employees and exactly the same issue. One or the other had to give way. Such direct conflicts similarly would require preemption under the 1996 Act: "Even where Congress has preserved some role for the states, the Supreme Court has found that 'state law is nullified to the extent that it *actually* conflicts with federal law.'"<sup>28</sup>

The telecommunications preemption cases upon which SBC relies are plainly inapposite. In the BellSouth *Memory Call Order*, for example, an order of the Georgia PSC prohibited the provision by BellSouth of voice mail service within the state, despite the fact that the federal regulatory framework permitted the provision of such services. Conceding the inconsistency between its order and the federal regulations, the Georgia PSC defended its decision on the grounds that it applied only to intrastate services.<sup>29</sup> But the Commission, relying on Supreme Court precedent, found that the facilities that were inconsistently regulated were "jurisdictionally mixed." Because it was not "possible to separate the interstate and intrastate portions of the

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<sup>27</sup> *Geier*, 861 U.S. at 875-83.

<sup>28</sup> *TRO* ¶ 192 n.613 (citing *Fidelity Federal Savings & Loan Assoc. v. de la Cuesta*, 458 U.S. 141, 154 (1982) (emphasis added)).

<sup>29</sup> *In re Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, 7 F.C.C.R. 1619, ¶ 2 (1992).

asserted FCC regulation,”<sup>30</sup> preemption was necessary to prevent the “application of the [Georgia] Order to the intrastate provision of the service.”<sup>31</sup>

Similarly, in *Telerent*, the Commission intervened to suspend the operation of a state regulation that explicitly prohibited the use of customer provided terminal devices.<sup>32</sup> Although it purported to apply only to intrastate facilities, the North Carolina regulation unavoidably applied also to interstate facilities (since all interstate service traveled over the covered facilities), and it therefore ran contrary to earlier Commission determinations that expressly permitted the use of subscriber-provided interconnection devices. The Commission concluded that the facilities at issue were subject to federal regulation, such regulation was frustrated by the state provision, and, therefore, that preemption was appropriate.<sup>33</sup>

In sum, SBC has done no more than rehearse the simple proposition that a direct conflict between Connecticut law and federal law would theoretically require preemption. As shown below, however, there is no direct conflict here.

## **II. The Specific Findings Of The DPUC**

As noted above, in order to find that a network element is subject to unbundling, Connecticut General Statute Section 16-247b(a) requires that the DPUC satisfy four criteria: (1) that the element is used to provide telecommunications services; (2) that it is in the public interest to order its unbundling; (3) that it is capable of being unbundled and tariffed; and (4) perhaps most importantly, that to do so is consistent with federal law. SBC has raised several

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<sup>30</sup> *Id.* ¶ 18 (citing *Louisiana Public Service Comm’n v. FCC*, 476 U.S. 355, 375 n.4 (1986)).

<sup>31</sup> *Id.* ¶ 19.

<sup>32</sup> See *In re Telerent Leasing Corp. et al. Petition for Declaratory Rulings on Questions of Federal Preemption on Regulation of Interconnection of Subscriber-Furnished Equipment to the Nationwide Switched Public Telephone Network*, 45 F.C.C.2d 204, ¶ 1 (1974).

<sup>33</sup> *Id.* ¶ 37 (“[I]t is impossible, from a practical and economic standpoint, for a common carrier to comply with conflicting Federal and State regulation.”)

specific challenges to the DPUC’s findings, arguing that each triggers the preemptive provisions of paragraph 195 of the *TRO*. But, as the following discussion establishes, each claim fails.

**A. Section 16-247b(a)’s “Used to Provide Telecommunications Services” Requirement**

The DPUC correctly found that SBC’s HFC facilities are “used to provide . . . telecommunications service[s]” even though they are not currently used for that purpose.<sup>34</sup> In reaching this conclusion, the DPUC scrupulously adhered to applicable federal judicial precedent and regulations and concluded that facilities *capable* of being used to provide telecommunications services meet the “used to provide” requirement.<sup>35</sup> It was undisputed that the original purpose of these facilities was to provide telecommunications services, and further admitted on the record that portions of this network are *still* used to provide such services.<sup>36</sup> Far from being inconsistent with federal regulations on this point, the DPUC’s determination finds direct support in the very federal provisions that SBC now seeks to use to invalidate the DPUC’s conclusion. In the *TRO*, for example, the Commission reaffirmed that a “network element” as defined in Section 153(29) of the 1996 Act requires the unbundling of elements that are “*capable of being used in the provision of a telecommunications service.*”<sup>37</sup>

Nonetheless, SBC claims that it does not use these facilities for providing telecommunications services.<sup>38</sup> To begin, this claim is false: apparently some of the HFC plant

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<sup>34</sup> *DPUC Decision* at 38.

<sup>35</sup> *Id.*

<sup>36</sup> *See supra* note 8.

<sup>37</sup> *TRO* ¶ 58.

<sup>38</sup> Emergency Request for Declaratory Ruling and Preemption, *In re SNET Petition for Declaratory Ruling and Order Preempting the DPUC’s Decision Directing SNET to Unbundle Its Hybrid Fiber Coaxial Facilities*, WC Docket No. 04-30, at 15 (FCC filed Feb. 10, 2004) (“SBC Petition”).

is still being used to provide telephony services.<sup>39</sup> But in any event, the *TRO* explicitly rejects the argument that SBC is seeking to revive, making abundantly clear that “network elements” cannot be confined to those *actually* used by the incumbent LEC.<sup>40</sup> It is not the case, as SBC argues, that the DPUC reached its decision because the HFC facilities could *conceivably* be used to provide telecommunications services.<sup>41</sup> Rather, as is undisputed, these facilities were designed to provide telecommunications services. And, to some extent, they are still used for those purposes. Given these two considerations, it obviously follows that they are *capable* of being used to provide such services as are required by both the state statute and the federal regulations. As the DPUC reasoned:

[T]he HFC network . . . was intended to provide voice services, and [is] therefore capable of providing telecommunications services. If deployment . . . had occurred as intended, the Company would have been well on its way to offering telecommunications services over the HFC network . . . [T]he Company would most likely have been required to permit competitors unbundled access to that network if it were fully functional today.<sup>42</sup>

Even if SBC claims that portions of the network require some upgrading and redeployment before entering service, the HFC facilities remain capable of providing telecommunications services consistent with the terms and purposes of the federal regulatory regime. In sum, the DPUC’s decision on this point is fully consistent with federal law. SBC’s arguments against it are not.

## **B. SBC’s Local Network**

SBC next claims that unbundling of the HFC facilities is inconsistent with federal law because they do not constitute part of SBC’s local network. Again, however, the record belies

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<sup>39</sup> See *supra* note 8.

<sup>40</sup> *TRO* ¶ 59.

<sup>41</sup> SBC petition at 15. Indeed, the word “conceivably” does not appear in the DPUC’s decision.

<sup>42</sup> *DPUC Decision* at 38.

this claim. Although put only to limited use, and allegedly in some disrepair, the HFC facilities run through SBC's network offices to local network end users. Put simply, they are not part of any other network, and therefore remain, as they were originally designed, part of SBC's network. Paragraph 366 of the *TRO*, on which SBC relies on this point, does nothing to change the fact that SBC deployed these facilities as part of its local network. The substance of paragraph 366 is not facilities, such as these, that an ILEC designed *as part* of its local network but declined to deploy, or deployed only in a limited fashion. Rather, paragraph 366 refers to network elements whose very design placed them *outside* incumbent local networks and therefore do not, as these facilities do, coincide with the incumbent's transport network.<sup>43</sup> The HFC facilities in this proceeding were designed to replace existing transport, and, in fact, continue to provide transport services. For SBC to try to manufacture the kind of conflict that might warrant preemption requires a misrepresentation of the DPUC's decision, as well as a gross overreading of the *TRO* itself, and a distortion of applicable federal preemption doctrine. And in any event, the portion of the *TRO* upon which SBC improperly relies has since been overturned by the D.C. Circuit, *U.S. Telecom Ass'n v. FCC*, No. 00-1012, \_\_F.3d\_\_, 2004 WL 374262, at \*29-\*30 (D.C. Cir. Mar. 2, 2004) ("*USTA*"), and the FCC under the circumstances certainly should not give its "outside the network" doctrine the wildly broad reading SBC proposes here.

### **C. HFC Facilities And Hybrid Copper-Fiber Loops**

SBC next claims that the *DPUC Decision* is "directly inconsistent" with provisions in the *TRO* relating to the unbundling of hybrid fiber-copper loops, which are addressed at length in the *TRO*. That claim, too, is false.

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<sup>43</sup> *TRO* ¶ 366.

To begin, as discussed above, the DPUC did not address hybrid fiber-copper loops, but coaxial cable. The FCC has *not ruled* on the leasing of hybrid fiber-coaxial cables. Nonetheless, SBC attempts to bootstrap the Commission’s specific findings about non-legacy hybrid copper-fiber loops into a ruling on HFC facilities, by claiming that the DPUC “repeatedly” concluded that the HFC facilities “appear to be analogous” to the hybrid fiber-copper loop facilities addressed in the *TRO*. It argues therefore that their unbundling obligations with respect to the two must be identical.<sup>44</sup> But a closer look at what the DPUC actually decided, and at the relevant provisions of the *TRO*, makes clear that SBC is again off the mark. First, the DPUC’s conclusion that the two kinds of facilities are analogous is clearly limited.<sup>45</sup> While the DPUC found that the HFC facilities are analogous in some respects to hybrid fiber-copper loops, in others, the DPUC also makes clear that “the HFC network is unique.”<sup>46</sup> SBC’s reductive conclusion that some similarity compels identical treatment is based on a gross overreading of the DPUC’s decision.

Perhaps the most important analogy between the coaxial cable at issue here and the hybrid copper-fiber facilities addressed in the *TRO* concerns impairment. In the *TRO*, the FCC found that competitors *are impaired* without access to the hybrid copper-fiber facilities, and those findings of impairment apply with full force (and for the same reasons) as the DPUC’s findings of impairment with regard to the coaxial cable at issue here. Thus, the DPUC determined that Gemini’s ability to enter the market and offer service to customers would be

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<sup>44</sup> SBC Petition at 20.

<sup>45</sup> The claim that HFC facilities are analogous to hybrid fiber-copper loops occurs only once, and is qualified by the explicit acknowledgment that the facilities “differ from those addressed by the FCC in the *TRO*.” *DPUC Decision* at 37.

<sup>46</sup> *Id.*

impaired without access to the HFC facilities.<sup>47</sup> The DPUC discussed several barriers to entry that would impair Gemini in that regard, and this discussion closely tracks the Commission's analysis of the impairment standard in the *TRO*.<sup>48</sup> In addition to the scale economies and first mover-advantages that the SBC has enjoyed,<sup>49</sup> Gemini is also operationally precluded from self-provisioning because all available infrastructure is occupied by the HFC that SBC refuses either to utilize or make available.<sup>50</sup> It also found that requiring Gemini to use SBC's copper wire facilities instead of the HFC broadband facilities would adversely affect Gemini's network performance to the extent that it would "seriously harm, if not destroy, Gemini's business plan and business."<sup>51</sup> The DPUC noted that only the HFC facilities offer the functions, features, and specifications that Gemini needs to provide its service.<sup>52</sup> These findings closely track the findings the Commission made concerning impairment of hybrid copper-fiber loops in the *TRO*.<sup>53</sup>

Notwithstanding finding impairment in the *TRO*, the FCC nevertheless declined to unbundle broadband access to hybrid copper-fiber cable because it believed that there were powerful countervailing considerations at play with regard to those specific facilities.<sup>54</sup> Those considerations were that by making the broadband capabilities of these facilities unavailable for lease, the FCC would incent the ILECs to deploy more fiber into the network, as well as more electronic equipment used to increase the functionality of that fiber. Here, in contrast, there are

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<sup>47</sup> *Id.* at 48.

<sup>48</sup> *Id.* at 41-42.

<sup>49</sup> See *TRO* ¶¶ 84-89; *DPUC Decision* at 41.

<sup>50</sup> See *TRO* ¶ 91 (discussing barriers within the ILEC's control).

<sup>51</sup> *DPUC Decision* at 42.

<sup>52</sup> *Id.*

<sup>53</sup> See *TRO* ¶¶ 286, 295.

<sup>54</sup> See *id.* ¶ 290.

no such countervailing considerations. SBC has no plans to further deploy coaxial cable in Connecticut, or electronic equipment associated with that cable. In fact, SBC apparently has no plans to use these facilities in any truly productive fashion. HFC facilities are fully deployed, and no longer subject to any meaningful investment incentives that might be served by their exclusion from the list of UNEs. Rather than slowing the deployment of new infrastructure, Gemini's petition to lease the HFC facilities represents *both* a competitive gain and productive reinvestment in still useful facilities.<sup>55</sup> Indeed, the DPUC held that the facilities constitute a valuable broadband infrastructure which SBC has effectively abandoned and is allowing to deteriorate, while Gemini is willing to revitalize them to provide "a full panoply of telecommunications services."<sup>56</sup> That being so, the countervailing considerations addressed in the *TRO* are not present here, and there plainly is no conflict between the DPUC's decision and the FCC's. To the contrary, the two decisions are in complete harmony.

#### **D. The Provision Of Qualifying Services**

Finally, SBC claims that the DPUC decision warrants preemption because Gemini is not yet providing a qualifying service over the network elements to which it does not yet have access. This claim borders on the frivolous. Until access is granted, *no* service can be provided.<sup>57</sup> SBC maintains that the DPUC *must* find that qualifying services are provided before UNEs are used to provide extra services, but it fails to identify where, in any federal regulation, such a requirement comes from. In any event, here too the portion of the *TRO* upon which SBC

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<sup>55</sup> While SBC claims that recommissioning the HFC network requires considerable investment, this issue is irrelevant to the question of whether unbundling the HFC facilities is inconsistent with federal law. Even if considerable investment were necessary, Gemini has pledged to finance any necessary investment, and even if SBC itself elected to provide the requisite upgrades, these costs would be factored into UNE rates.

<sup>56</sup> *DPUC Decision* at 37, 44.

<sup>57</sup> *TRO* ¶ 135.

relies concerning “qualifying services” has since been reversed by the reviewing court, *USTA*, 2004 WL 374262, at \*36-\*37, and the Commission would be ill-advised to accept what would be a substantial expansion of this now-overruled construction of the 1996 Act.

SBC also claims that Gemini is misleading the DPUC by promising to provide qualifying services, arguing that Gemini’s “generic commitment is insufficient as a matter of law.”<sup>58</sup> But Gemini’s “commitment” and motive are matters best left to the DPUC, and SBC’s disagreement about the DPUC’s assessment of Gemini’s motives raise no issue of federal preemption. The DPUC found that Gemini has submitted its proposals for bringing the HFC facilities into qualifying service, a proposal that depends upon providing a full suite of telecommunications services. It has qualified to provide local telephony, and, as the DPUC makes clear, its unbundling order rests upon the expectation, backed by the requirements of the *TRO*, that Gemini will bring the HFC facilities into qualifying service.<sup>59</sup>

## CONCLUSION

Essentially, SBC has done no more than try to turn a highly state- and fact-specific determination into a dramatically overstated question of law. Nothing in the DPUC’s decision presents the kind of open conflict that might trigger the preemption provisions of paragraph 195 of the *TRO*. To the contrary, a proper reading of the DPUC’s *Decision* reveals that it is entirely consistent with the regulatory imperatives and delicate balancing that the Commission has mandated. To the extent that issues of fact remain contested, SBC is obliged to address its

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<sup>58</sup> SBC Petition at 21.

<sup>59</sup> Indeed, if SBC’s representations about the current serviceability of the HFC network are accurate, it is not clear that *any* service can be provided until Gemini performs its upgrades and reconditioning.

concerns through the well-established costing procedures established by the 1996 Act, rather than prematurely and disingenuously petition this Commission to intervene.

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